at the rate of 8% pa under s 48 of the Act in respect of the excess sum of $89,800 from the date the CLR took possession of the land until the date of payment of the excess sum. The deposit (if any) lodged under s 39 of the Act shall be refunded to the objectors who are also entitled to costs to this land reference proceeding. I further direct that each assessor shall receive a fee of $100 per day for the three days' hearing of this reference which will have to be paid by the respondent. Finally both assessors fully concur with this judgment.

Order accordingly.

Solicitors: *Zain & Co.*

Reported by *PS Ranjan*

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors

HIGH COURT (MUAR) - CIVIL SUIT NO 75 OF 1978
EUSOFF CHIN J
25 OCTOBER 1988

Evidence - Document in agreed bundle - Document included in agreed bundle due to oversight of previous solicitors - Whether privileged communication - Interlocutory application to remove document and expunge evidence relating thereto - Whether privilege waived - Whether express consent of defendants obtained for disclosure of document - Evidence Act 1950, ss 126, 127, 128 & 129

In the course of the trial of this suit, the first plaintiff in his evidence referred to a document found at p 13 of the agreed bundle of documents. The document was a communication between the first ten defendants and their original solicitors and had been included in the bundle due apparently to an oversight by the previous solicitors who had taken over the case from the original solicitors. During the adjournment the 14 defendants filed a joint interlocutory application to have the document removed from the bundle and all references to the said document by the first plaintiff in the notes of evidence taken at the hearing expunged on the grounds that the document was a privileged communication between solicitor and client and no express consent had been given by the defendants to disclose the contents of the document.

Held, allowing the defendants' application:

(1) The document, being a document containing instructions from the defendants to their solicitors, is a privileged document and cannot be disclosed to anyone except with the express consent given by each of the defendants.

(2) Even if the defendants' solicitors had given the document to the first plaintiff in the presence of all the defendants (which was disputed by the defendants), the fact that none of the defendants had objected to it, or that all had remained silent, did not constitute waiver of the privilege since the law requires that the defendants must give their express consent to their solicitors before the document could be disclosed to anyone.

(3) Since the document is a privileged document being communication between solicitors and clients and express consent for its release to anyone had not been given by the defendants to their solicitors, the document could not be released to the first plaintiff, and it should be excluded from the bundle of documents, and any evidence relating to its contents so far adduced in court should be expunged from the court record.

[*Editorial Note*: The plaintiffs' appeal to the Supreme Court vide Civil Appeal No 184 of 1988 was heard and dismissed on 24 May 1989.]

Case referred to
1 *Bullock* v *Corry & Co* (1878) 3 QBD 356 (refd)

Legislation referred to
Evidence Act 1950 (Rev 1971) ss 126, 127, 128, 129

Shao Kam San for the plaintiffs.
Ng Seng Kang for the first and second defendants.
Ong Chee Seong for the third defendant.
Daniel Tay Choon Beng for the fourth defendant.
Chua Su Yin (Ms) for the fifth to ninth, thirteenth and fourteenth defendants.
Lee Buck Heng for the tenth and eleventh defendants.
E Ramasamy for the twelfth defendant.

Cur Adv Vult

Eusoff Chin J: In the course of the trial of this suit, reference was made by the first plaintiff, Dato' Au Ba Chi, to a document found at p 13 of the agreed bundle of documents. An application was filed by way of notice of motion by the six counsel for the 14 defendants to have this p 13 expunged from the bundle of documents, and evidence of PW1 referring to this document at p 13 ABD be expunged from the notes of evidence. The application was an open court application but heard in chambers. The order granted was extracted as an open court order.

The impugned document was signed by the defendants and given to their former solicitors T Thalayasingam & Co on 5 November 1972 [date uncertain]. The document is worded as follows:

> We, the undersigned being the co-owners of the land held under grant no 2936, for lot no 375, township of Bandar Penggaram, Batu Pahat to the extent of 461189300/483189300 undivided shares, do hereby acknowledge receipt of the sum of dollars thirty five thousand only ($35,000) from Thalayasingam & Co, 8 Jalan Edrus, Batu Pahat by means of their cheque no 491756 on OCBC Ltd, Batu Pahat in favour of Khern Seng Chye and Chua Keng Sam subject to the following terms and conditions:
>
> a That we agree to sell our 461189300/483189300 undivided shares in the land held under grant no 2936 for lot no

375, township of Bandar Penggaram, Batu Pahat to (i) Lim Kim Cheong of 31 Jalan Selating, Singapore; (ii) Au Ba Chi; (iii) Tee Eng Teck @ Teo Eng Teck; and (iv) Sek Ann Tong of Johore Bahru (all represented by John Ang & Co, MCA Buildings Johore Bahru) for the consideration of dollars four hundred and fifty thousand only ($450,000) towards which we accept the above sum of $35,000 and another sum of $10,000 already paid (aggregating to $45,000) by way of deposit.

b We hereby agree and undertake to perform our agreement with Esso Standard Malaya Ltd in respect of our sale of 22,000 sq ft of the said land to them whereby we have agreed to procure a separate title deed for the said area sold for a petrol kiosk, and further agree to indemnify the above-named purchasers from all claims and damages if any by the said Esso Standard Malaya Ltd.

Dated this [date uncertain] day of November 1972.

1 Sgd illegible
2 Sgd illegible
3 Sgd illegible
4 Sgd illegible
5 Sgd illegible
6 Sgd illegible
7 Sgd illegible
8 Sgd illegible
9 Sgd illegible
10 Sgd illegible

We Khern Seng Chye and Chua Keng Sam acknowledge receipt of cheque no 491756 from T Thalayasingam & Co.

Sgd illegible Sgd illegible

The fourteenth defendant affirmed an affidavit to support this application. According to him all the defendants originally retained T Thalayasingam & Co as their solicitors to act for them in connection with the sale of their land lot no 375 township of Bandar Penggaram to the four plaintiffs and to Esso. However in April 1976, T Thalayasingam died. Subsequently, the defendants retained HN McLeod as their solicitor. The fourteenth defendant who had collected all the relevant files and documents from T Thalayasingam handed them to HN McLeod in May 1978. According to the fourteenth defendant, he and the 13 other defendants had not authorized or consented to either T Thalayasingam or HN McLeod to release this document to either the plaintiffs or the plaintiffs' solicitors, or to anyone else. The fourteenth defendant claimed that the contents of the document at p 13 was and is privileged communication between clients and their solicitors.

The second defendant also affirmed an affidavit for himself and on behalf of the other defendants. He said he was one of the ten defendants who first signed the impugned document, and as the document also contained confidential instructions to their then solicitors T Thalayasingam, it was not meant to be released to anyone, or copies of it made and given to anyone, without the defendants' express consent. He alleged that if anyone had possession of a copy of this document, then it had been so obtained without the consent of the defendants.

Chua Su Yin, an advocate and solicitor, affirmed an affidavit to the effect that after HN McLeod retired from practising as an advocate and solicitor, the fourteenth defendant had given her the relevant files and she was retained as the solicitor for the fifth, sixth, seventh, eighth, ninth, thirteenth and fourteenth defendants. She had perused the contents of the files, and had not seen any written consent given by any of the defendants to their former solicitors for the document at p 13 to be released by their former solicitors to anyone. According to her, when she took over the files and the case for those defendants, the agreed bundle of documents had already been filed in court, and she believed that HN McLeod must have included the impugned document due to an oversight. She alleged that the contents of this p 13 in ABD contained privileged communications between clients and solicitors, and should not have been included in the agreed bundle, or be admitted in evidence.

In his affidavit, the first plaintiff Dato' Au Ba Chi said that he had visited the office of the late T Thalayasingam on 5 November 1972 and saw the defendants in that office, and that after the defendants had signed the document at p 13 of ABD, a photocopy was given to him by the late T Thalayasingam in the presence of the defendants.

The first and second defendants in their affidavits in reply categorically stated that they were not in the office of T Thalayasingam at Batu Pahat on 5 November 1972. According to them the ninth defendant Khern Seng Chye took the document to their houses in Muar to be signed. They said that the document contained confidential instructions to their solicitors, and that negotiations between the defendants and the plaintiffs broke down subsequently and no agreement of sale and purchase was executed between the parties. According to them they never gave any consent or instruction to their solicitors to release the document to anyone.

I do not believe that the first plaintiff Dato' Au Ba Chi was at the office of T Thalayasingam on 5 November 1972, and was given the document. According to the document at p 12 of ABD, John Ang, the solicitors for the first plaintiff, sent a registered letter from Johore Bahru to T Thalayasingam on 3 November 1972 authorizing T Thalayasingam to release the $35,000 deposit he was holding to the defendants. This was a Friday. The letter would be delivered at the earliest, the next day, 4 November 1972 which could not be delivered because it was Deepavali Day and so was a public holiday. The next day 5 November 1972 was a Sunday, and the post office was closed on Sunday in Johore. Therefore the earliest date could be 6 November 1972 for Thalayasingam to have

received the letter and to release the payment to the defendants. Furthermore, even if the document was given by T Thalayasingam to Dato' Au Ba Chi, in the presence of the defendants, the delivery was without the express consent of the defendants.

Sections 126 to 129 of the Evidence Act 1950 deal with the law relating to professional communication between clients and their legal advisers or their clerks. Sections 126 to 129 read:

> 126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure
>
> (a) any such communication made in furtherance of any illegal purpose;
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> Explanation - The obligation stated in this section continues after the employment has ceased.
>
> 127 Section 126 shall apply to interpreters and the clerks or servants of advocates.
>
> 128 If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.
>
> 129 No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

As regards professional communications, the rule is now well settled that where a barrister or solicitor is professionally employed by a client, all communication which passes between them in the course and for the purpose of that employment are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them whether they be in the form of title deeds, wills, documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity, and this even though third persons were present. (See *Sarkar on Evidence* (10th Ed) p 1080.)

Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock* v *Corry & Co*[1]).

'Unless with his client's express consent', appearing in s 126. The privilege is that of a client; he may expressly waive the privilege under s 126 or impliedly under the latter part of s 128 by calling the barrister, pleader, etc, as witness and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege if he gives evidence in the suit either at his instance or at the instance of the opposite party. (*Sarkar on Evidence* (10th Ed) p 1082.)

The learned counsel for the plaintiffs did not dispute that express consent of each defendant was required, but questioned whether the document at p 13 of ABD is a privileged document. This document appears to have been given by the defendants to their solicitors, T Thalayasingam, not to the plaintiffs. The figure '5' in the date, upon close scrutiny would appear to be originally written as '6'.

A close examination of this p 13 of ABD would show that the first paragraph is the defendants' acknowledgement of the receipt of $35,000 vide cheque no 491756 from their own solicitors. The next two paragraphs contain conditions subject to which the $35,000 was accepted by the defendants. These conditions are in fact instructions given by the defendants to their own solicitors which they might have intended to form part of their sale and purchase agreement with the plaintiffs. So far it had not been proved that an agreement was ever signed between the plaintiffs and the defendants. In my view this p 13 of ABD being a document containing instructions to the defendants' solicitors, is a privileged document, and cannot be released to anyone except with the express consent, ie consent in writing, given to the solicitors by each of the defendants. Even if the defendants' solicitors had given this document to the first plaintiff in the presence of all the defendants (which is disputed by the defendants), the fact that none of the defendants had objected to it, or that all had remained silent, did not constitute a waiver, since the law requires that the defendants must first give their express consent to their solicitors before the document could be released to anyone. Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being

released to the first plaintiff. In this case, since I find that the document is a privileged document being communication between clients and solicitors, and express consent for its release to anyone had not been given by the defendants to their solicitors, the document could not be released to the first plaintiff, and it should be excluded from the bundle of documents, and any evidence relating to its contents so far adduced in court should be expunged from the court record.

Application allowed.

Solicitors: *John Ang & Jega; Ng Seng Kang & Partners; Ong Chee Seong & Associates; Tay Kuan Teck & Son; Chua Su Yin & Co; Abdullah, A Rahman & Co; E Ramasamy & Co.*

Reported by Wong Kim Fatt